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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

TERRENCE LEE HERSHNER, Plaintiff and Appellant, v. DEPARTMENT OF MOTOR VEHICLES, Defendant and Respondent.	H044286 (Santa Cruz County Super. Ct. No. 16CV01001)

Plaintiff Terrence Lee Hershner's license was administratively suspended following his arrest for driving under the influence of alcohol. He requested a hearing before a Department of Motor Vehicles hearing officer, who confirmed the license suspension after taking evidence and hearing testimony from the arresting officer. Plaintiff challenged the hearing officer's decision via petition for writ of mandate, arguing there was no reasonable suspicion to conduct the traffic stop that led to his arrest because his drifting into another lane was caused by the arresting officer's tailgating. The trial court found the detention unlawful, but nonetheless denied the petition. Plaintiff argues again on appeal that there was no reasonable suspicion to conduct the traffic stop, that all evidence obtained as a result of the traffic stop should have been excluded, and that the license suspension must therefore be reversed. Based on our conclusion that the exclusionary rule does not apply in this civil administrative proceeding, we will affirm the judgment.

I. ADMINISTRATIVE AND TRIAL COURT PROCEEDINGS

1. The Traffic Stop

The following is based on the reports and administrative hearing testimony of the arresting officer. The officer was driving southbound on Highway 17 shortly after 2:00 a.m. when he observed a black SUV (plaintiff was later identified as the driver). The officer drove closer to check the license plate, and followed approximately 40 feet behind the car for about two minutes. The officer testified that while his following distance was closer than would be typical of ordinary drivers, it was routine for him to follow at a shorter distance to be able to view plate numbers and other car features. The speed limit was 65 miles per hour, and the SUV was not speeding. During the two minutes the officer followed the car it drifted twice from the right lane about a foot into the left lane. The officer decided to pull the car over on suspicion that the driver had violated Vehicle Code section 21658 (driving within a single lane).

The officer's report recounts plaintiff's explanation that "the reason he had drifted into the number one lane the two occasions I had seen, was because he had been checking his rearview mirror; he had mistaken my marked patrol vehicle for a friend's vehicle that [plaintiff] had believed was following him." Plaintiff's attorney was allowed to read several hearsay statements attributed to plaintiff into the record while questioning the officer; the statements were part of an audio recording the officer had made of the detention. (It appears parts of the recording were also played for the hearing officer, but were not transcribed.) According to the attorney's recitation of those statements, upon being pulled over plaintiff told the officer: " 'You guys were right on my butt the whole entire time. I kept looking in my mirror. [¶] ... [¶] I was looking in my rearview mirror more than I was looking ahead because you were really close behind me.' " The officer confirmed that plaintiff made those statements. The officer testified that plaintiff took no action suggesting he believed the officer was following too close, such as braking, slowing down, flashing lights, or signaling with his hands.

Once plaintiff pulled over, the officer approached and immediately noticed a strong odor of alcohol and that plaintiff's eyes were watery. The officer asked plaintiff to perform field sobriety tests, including a test for horizontal gaze nystagmus, a walk and turn, and a one-legged stand. There was a lack of smooth eye pursuit in the nystagmus test, plaintiff lifted his arms for balance during the walk and turn, and plaintiff lost his balance during one a one-legged stand. The report notes that the part of the highway where plaintiff was pulled over was not entirely level, but that after being made aware of the incline plaintiff agreed to perform the tests anyway. Based on the results of those tests, the officer conducted two preliminary alcohol screenings, which measured plaintiff's blood alcohol level above 0.11 percent. Plaintiff was arrested, his license was suspended, and he consented to a blood test. The blood test results showed a blood alcohol level of 0.10 percent.

2. DMV Administrative Hearing

Plaintiff requested a DMV hearing to contest the license suspension. (Veh. Code, § 13558, subd. (a).) When he failed to appear at the first scheduled hearing, plaintiff's counsel informed the hearing officer that plaintiff was suffering from severe depression and requested a continuance. At the continued hearing several months later, plaintiff again failed to appear and therefore never testified. The hearing officer heard testimony from the arresting officer, which we have summarized, and considered argument from plaintiff's counsel. Plaintiff's counsel's argument focused on whether reasonable suspicion supported the traffic stop, and whether the arresting officer's following distance was the actual cause of plaintiff's lane drifting. The hearing officer confirmed the license suspension with written findings of fact. The findings acknowledge plaintiff's argument that the arresting officer's driving allegedly caused plaintiff to drift out of his lane. But the hearing officer found that "no direct evidence or testimony has been given to show the driving impairments ... were a direct result of any interaction" with the arresting officer. The hearing officer concluded there was reasonable cause for the officer to

believe plaintiff was driving under the influence of alcohol, that the arrest was lawful, and that plaintiff's blood test showed a blood alcohol level over 0.08 percent.

3. Mandate Petition in the Trial Court

Plaintiff challenged the hearing officer's decision by petition for writ of mandate in the trial court. After briefing and a hearing, the trial court concluded, based on its "independent review of the record and the facts, ... that the officer caused the weaving and that's why the detention was illegal." The trial court requested supplemental briefing on whether an arrest can be lawful for purposes of an administrative license suspension where the underlying detention was unlawful. At a later hearing, the court concluded that a lawful detention is not a prerequisite to license suspension under Vehicle Code section 13557. It denied plaintiff's petition after finding the evidence supported the elements required for a license suspension. Alternatively, the trial court found the arrest to be lawful because the exclusionary rule does not apply in the administrative context. Following an unsuccessful motion for new trial, plaintiff timely appealed.

II. DISCUSSION

Plaintiff contends there was no reasonable suspicion to detain him because the arresting officer caused plaintiff's lane drifting, and the exclusionary rule should render inadmissible all evidence obtained from the traffic stop.

Plaintiff received notice of the license suspension from the arresting officer, triggering a right to review by the DMV to determine whether evidence supported the three factors necessary to sustain the suspension: (1) the officer had "reasonable cause to believe that the person had been driving a motor vehicle" under the influence of alcohol in violation of Vehicle Code section 23152; (2) plaintiff "was placed under arrest"; and (3) plaintiff was driving the motor vehicle with "0.08 percent or more, by weight, of alcohol" in his blood. (Veh. Code, § 13557, subd. (b)(3)(A)–(C)(i).) On administrative review, the DMV hearing officer will confirm a suspension if he or she determines that a

preponderance of the evidence supports those factors. (*Lake v. Reed* (1997) 16 Cal.4th 448, 456 (*Lake*).)

Under the Fourth Amendment to the United States Constitution, reasonable suspicion for a traffic stop exists if the detaining officer can "point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231 (*Souza*).) When deciding a petition for writ of mandate challenging an administrative license suspension, the trial court is "required to determine, based on its independent judgment, ' "whether the weight of the evidence supported the administrative decision." ' " (*Lake, supra,* 16 Cal.4th at p. 456.) On appeal from the trial court's decision, we review the record to determine whether the trial court's factual findings are supported by substantial evidence. (*Ibid.*) We review de novo the trial court's resolution of questions of law, including whether reasonable suspicion supported the traffic stop. (*Arburn v. Department of Motor Vehicles* (2007) 151 Cal.App.4th 1480, 1484.)

A. THE TRIAL COURT'S FACTUAL FINDINGS

The DMV argues that no evidence supported the trial court's factual finding that the "officer caused the weaving." To make that finding, the trial court had to have credited the hearsay statements by plaintiff that were read into the record at the administrative hearing by plaintiff's counsel and confirmed by the arresting officer as having been made by plaintiff. In administrative hearings, hearsay evidence "may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Gov. Code, § 11513, subd. (d); *Lake, supra,* 16 Cal.4th at p. 458 [confirming that the Administrative Procedures Act applies to Vehicle Code section 13558 hearings].) Had there been a hearsay objection, plaintiff's statements would have been inadmissible, as they do not fall within any exception to the

rule against hearsay. (They would not be admissible as statements of a party opponent under Evid. Code, § 1220 because plaintiff introduced his own statements rather than statements of an opposing party.) But because there was no objection, the statements were admitted and the trial court could rely on them for its factual finding that the officer caused plaintiff's drifting. (*West Coast Life Ins. Co. v. Crawford* (1943) 58 Cal.App.2d 771, 784 ["it is established that [hearsay] evidence, though incompetent, received without objection is sufficient to support a finding"].)

Though we might make a different finding if we were sitting as the trier of fact, when reviewing for substantial evidence we may not substitute our judgment for that of the trial court. (*Regents of University of California v. Public Employment Relations Bd.* (1986) 41 Cal.3d 601, 617.) Because the hearsay statements in the record are sufficient to support the trial court's factual finding that the officer caused plaintiff to drift out of his lane, we must conclude that the traffic stop was an unlawful detention.

B. APPLICABILITY OF THE EXCLUSIONARY RULE IN THIS CIVIL ADMINISTRATIVE CONTEXT

Because plaintiff's detention was unlawful under the facts as found by the trial court, whether his arrest was lawful (in order to satisfy the arrest factor of Veh. Code, § 13557, subd. (b)(3)(B)) will depend on whether the exclusionary rule applies in this civil administrative proceeding. If the exclusionary rule does not apply, then the arrest was lawfully based on probable cause to believe plaintiff was driving under the influence of alcohol via plaintiff's watery eyes, the odor of alcohol, field sobriety tests, and preliminary alcohol screenings. If the exclusionary rule does apply, all of that evidence would be inadmissible and plaintiff's arrest would be unlawful. Determining whether the exclusionary rule applies is a question of law we review de novo. *Park v. Valverde* (2007) 152 Cal.App.4th 877, 881 (*Park*) addressed applicability of the exclusionary rule in the same context as that presented here.

Park was pulled over because police records indicated the car he was driving was stolen. But the police records were outdated; Park's car had been stolen, but was recovered and returned to him months before the traffic stop. (*Park*, *supra*, 152 Cal.App.4th at p. 880.) While Park was detained waiting for the police officer to resolve the records issue, the officer noticed that Park appeared to be intoxicated. He had bloodshot and watery eyes, an unsteady gait, and smelled of alcohol. Park was arrested after failing a field sobriety test, and a post-arrest breath test measured a blood alcohol level over the legal limit. Park's criminal DUI proceedings were eventually dismissed based on application of the exclusionary rule in light of the unlawful detention. (*Ibid.*) In his petition for writ of mandate challenging the administrative license suspension by the DMV, Park argued that the exclusionary rule should apply to the administrative proceedings as well. The exclusionary rule was found to be inapplicable, and the petition was denied. (*Park*, at p. 881.)

The appellate court explained the application of the exclusionary rule in civil contexts. (*Park*, *supra*, 152 Cal.App.4th at p. 882.) The purpose of the exclusionary rule is to deter police misconduct. It is rarely applied in civil actions, generally only when the civil proceedings so closely identify with the aims of a criminal prosecution as to be deemed quasi-criminal in nature. (*Park*, at p. 883, citing *In re Lance W.* (1985) 37 Cal.3d 873, 892.) The *Park* court observed that the DMV's administrative license suspension process is a civil remedy that is not penal in nature. Based on *Gikas v. Zolin* (1993) 6 Cal.4th 841 (*Gikas*), the court noted the contrast between criminal drunk driving prosecutions and DMV administrative proceedings: The purpose of DUI prosecutions is to punish drunk drivers, whereas the purpose of administrative license suspensions is to reduce the number of drunk drivers on the road by removing their driving privileges. (*Park*, at pp. 883, 887.)

The *Park* court looked to Supreme Court authorities announcing a case-by-case balancing test for determining whether the exclusionary rule should apply in a particular

civil setting. (*Park*, at pp. 885–887.) Courts must take into account both the nature of the civil proceedings and the social costs of excluding evidence from those proceedings. (*Emslie v. State Bar* (1974) 11 Cal.3d 210, 228.) Applying that approach to DMV license suspension proceedings, the *Park* court decided the exclusionary rule did not apply under the facts of that case. The court acknowledged applying the exclusionary rule could "theoretically provide a supplemental basis for deterring law enforcement officials from maintaining inaccurate stolen vehicle records." (*Park*, *supra*, 152 Cal.App.4th at p. 887.) But it also recognized the DMV's responsibility to get drunk drivers off the road and emphasized the different purposes of criminal versus administrative drunk driving proceedings. The court concluded that the exclusionary rule's application in criminal proceedings should adequately deter inaccurate recordkeeping. It also noted the lack of "any egregious conduct ... that would support the application of the exclusionary rule" in an administrative proceeding. (*Ibid.*)

We find *Park*'s reasoning persuasive. The exclusionary rule would apply with full force to any criminal proceedings against plaintiff, serving to deter any police misconduct. Although excluding evidence from the DMV proceeding might also deter officers from following cars as closely as the arresting officer in this case, the social costs of allowing drunk drivers to circumvent license suspensions is high.

Plaintiff attempts to distinguish *Park* by arguing that here "there was egregious and deliberate conduct by the officer to subvert the normal 'independent justification' to effectuate a traffic stop, and instead the officer's own aggressive harassing tailgating of plaintiff was used to cause plaintiff to commit a traffic violation that would give the officer the reason to stop the vehicle." (Underlining omitted.) But the record does not support a finding that the officer's conduct was egregious, aggressive, or harassing. The officer's car was following 40 feet behind plaintiff in order to inspect plaintiff's license plate. The officer testified that following at that distance was routine to be able to see a car's features at night. We acknowledge that the officer's following distance was closer

than the DMV Driver Handbook's "three-second rule," but the "rule" is a general recommendation for drivers and does not prevent a peace officer from following a car for a relatively short time for an otherwise permissible investigation.

Plaintiff contends the DMV's administrative license suspension proceedings are quasi-criminal. But as we explained in our summary of *Park*, the proceedings at issue here are not penal in nature and they serve a different purpose than criminal drunk driving laws (the administrative scheme protects the public by keeping drunk drivers off the road while the criminal laws punish drunk drivers for their misconduct). Plaintiff contends that excluding the evidence will deter police misconduct. But deterrence is already achieved by applying the exclusionary rule in any criminal case arising from the same detention. Plaintiff argues that because "[i]f someone is drunk or otherwise chemically impaired, his or her driving will show it," the "social cost of letting someone whose driving shows no indications of impairment drive to their destination is minimal." But the Legislature has made a policy choice to suspend the license of any person driving with over 0.08 percent blood alcohol, regardless of whether that level of intoxication substantially impairs the person's driving ability. Plaintiff points to a high social cost of "allowing police officers to break the law and aggressively tailgate drivers who exhibit no signs of impairment." That may be so as a general proposition, but the record here simply does not support a finding that the arresting officer was aggressively tailgating plaintiff or engaging in any egregious conduct that might justify applying the exclusionary rule. Despite plaintiff's argument to the contrary, declining to apply the exclusionary rule on these facts will not adversely affect the integrity of the judicial process.

Plaintiff argues that because his detention was unlawful, his arrest must have been unlawful as well. He points to Justice Kennard's dissenting opinion in *Gikas*, where the justice stated that a license suspension must be based on a lawful arrest, and a "prerequisite to a lawful arrest is a lawful detention." (*Gikas, supra*, 6 Cal.4th at p. 873,

fn. 5, (dis. opn. of Kennard, J.).) Although true as a matter of criminal law, the principle does not extend uniformly to all civil administrative proceedings. In civil matters where the exclusionary rule does not apply, evidence discovered during an unlawful detention can provide probable cause to arrest as well as reasonable cause to believe a person is driving under the influence of alcohol. (See *Park*, *supra*, 152 Cal.App.4th at p. 888.)

We recognize that our decision may result in seemingly contrary outcomes in certain cases (i.e., an administrative license suspension without a DUI conviction). But the distinct purposes of the criminal versus administrative proceedings explain why a DUI acquittal does not preclude an administrative license suspension arising from the same arrest. As we have already discussed, the express legislative purpose of administrative license suspension proceedings is to " 'provide safety to persons using the highways by quickly suspending the driving privilege of persons who drive with excessive blood-alcohol levels' " (*Lake*, *supra*, 16 Cal.4th at p. 454), whereas criminal DUI proceedings are meant to punish drunk drivers. Given that both legislative schemes are rational and each serves a distinct purpose, we find nothing absurd in the possibility that an individual might avoid a DUI conviction while still having his or her license administratively suspended.

C. ANCILLARY ISSUES

Plaintiff argues for the first time on appeal that the arresting officer was breaking the law by driving too closely (in alleged violation of Veh. Code, § 21703), and that the field sobriety tests could not support a lawful arrest because they were performed on an incline. Plaintiff forfeited those arguments by failing to raise them at the administrative hearing. (*People v. Clark* (2016) 63 Cal.4th 522, 584.)

Plaintiff's remaining arguments are not relevant to resolving this appeal. He attacks the administrative hearing officer's findings of fact as arbitrary and capricious for not agreeing with his argument that the officer caused the drifting, and for using the word "weave" instead of "drift." But the hearing officer's findings are immaterial at this stage

in the proceedings because the trial court made its own findings, and it is the trial court's findings we review for substantial evidence. Plaintiff argues that the DMV's trial counsel made multiple factual misrepresentations in its briefing before the trial court, including using the word "weave" instead of the officer's terminology of "drift"; arguing that plaintiff had slurred speech without evidence to support that contention; incorrectly stating that plaintiff refused a blood test; and allegedly misleading the trial court by providing an incomplete description of the *Park* case. We acknowledge that the DMV's memorandum of points and authorities in the trial court contained certain factual errors, but the record does not suggest that the errors impacted the trial court proceedings to plaintiff's detriment.

III. DISPOSITION

The judgment denying plaintiff's petition for writ of mandate is affirmed.

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Grover, J.

WE CONCUR:

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Greenwood, P. J.

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Elia, J.